

ORDINANCE OF THE COUNCIL OF THE CITY OF FRESNO  
PROPOSED AND INITIATED BY \_\_\_\_\_  
MOVED BY Duncan SECONDED BY Dages

BILL NO. R 32

ORDINANCE NO. 2004-41

AN ORDINANCE OF THE CITY OF FRESNO, CALIFORNIA,  
ADDING ARTICLE 6 TO CHAPTER 3 OF THE FRESNO  
MUNICIPAL CODE RELATING TO REGULATED  
COMMUNICATIONS WITH MAYOR AND  
COUNCILMEMBERS DURING COMPETITIVE  
PROCUREMENT PROCESS.

THE COUNCIL OF THE CITY OF FRESNO DOES ORDAIN AS FOLLOWS:

SECTION 1. Article 6 is added to Chapter 3 of the Fresno Municipal Code to read:

ARTICLE 6

REGULATED COMMUNICATIONS  
WITH ELECTED OFFICIALS IN CITY  
PROCUREMENT PROCESS

Section	3-601.	Regulated Communications in City Procurement Process.
	3-602.	Declaration of Legislative Intent.
	3-603.	Definitions.
	3-604.	Applicability.
	3-605.	Regulation of Communications During Competitive Procurement; Notice of Regulation.
	3-606.	Disclosure of Regulated Communications.
	3-607.	Sanctions.
	3-608.	Evaluation of Disclosed Communications; Criteria for Imposition of Sanctions; Appeals.

SECTION 3-601. REGULATED COMMUNICATIONS IN CITY  
PROCUREMENT PROCESS. This article shall be known as the Regulated  
Communications in City Procurement Process Ordinance.

Adopted 3/30/04  
Approved 4/6/04  
Effective 5/7/04

2004-41

SECTION 3-602. DECLARATION OF LEGISLATIVE INTENT. In enacting this article, the Council hereby declares and finds as follows:

- (a) All communications by and between Proposers, the Mayor and Councilmembers in competitive procurement should be open and public.
- (b) All elected officials should be provided the same information for decision-making involved in competitive procurement.
- (c) The provisions of this article are necessary and appropriate in order to instill greater public confidence in the integrity of the City's procurement processes by eliminating the appearance of impropriety and special consideration.
- (d) The provisions of this article will lessen the chance of miscommunication or misunderstanding during competitive procurement.
- (e) The provisions of this article will foster a greater sense of equity and fair play in competitive procurement.
- (f) The provisions of this article ensure that the Mayor and all Councilmembers are afforded equal access to information during the procurement process.
- (g) The provisions of this article are intended to provide Councilmembers and the Mayor more useful information with which to render a fair and just decision.

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(h) This article furthers the Charter purpose of having professional staff research, evaluate, and make recommendations concerning the award of public contracts.

(i) Nothing in this article is intended to chill First Amendment Free Speech rights, such as the public's right to petition government, or the elected official's right of Free Debate.

(j) This article provides Proposers with defined channels to communicate information to Councilmembers and the Mayor, consistent with the overall purposes of this article.

(k) The award of a contract and the acts leading up to it are legislative in nature.

(l) In enacting this article, it is not the intent of the Council to change the legislative nature of its procurement process.

(m) This article generally, and Section 3-608 in particular, relate to an internal procedure dealing with the subject of competitive procurement. Nothing in this article shall confer upon, or create rights in, any person that the person would not have absent this article.

SECTION 3-603. DEFINITIONS. The following definitions shall apply for purposes of this article:

(a) "Bidder" shall mean a person or entity responding to a competitive bid process, including a Bid Invitation as defined in this article.

(b) "Bid Invitation" shall mean a notice in writing to potential

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bidders to submit bids to the City, when any award is to be made to the lowest responsive and responsible bidder, subject to the City's right to reject any and all bids.

(c) "Communication" means communication in any form, directly or indirectly, by or between a Proposer, on the one hand, and Councilmember or the Mayor, on the other hand, during the pendency of a competitive procurement regardless of whether or not the Proposer at the time of the communication had yet to put forward, present, or sponsor a request, proposal, bid, or quote for consideration of a contract, if the Proposer eventually does so.

(d) "Competitive bidding" shall mean the offering procedure involving sealed bids to the City for materials, supplies, equipment or any public work of improvement, as described in Charter Section 1208 and Section 3-105 of this Code.

(e) "Competitive procurement" shall mean and include the processes for competitive bidding, request for expression of interest, request for proposals, and request for qualifications, as defined in this article.

(f) "Continue" shall mean to persist in, remain in, carry on, recommence or resume a communication.

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(g) "Disclosure" shall mean the writing, or oral statement entered in Council proceedings, containing the information required by Section 3-606 necessary to disclose a regulated communication.

(h) "Elected official" shall mean the Mayor or any Councilmember.

(i) "Initiate" shall mean to cause a communication to begin; to send, transmit, or convey information.

(j) "Initiation of competitive procurement" shall mean the issuance, publication or announcement by the City of Request for Expression of Interest (RFEI), request for proposals (RFP), request for qualifications (RFQ), or Bid Invitation. The competitive procurement remains pending until it is completed upon either the award of a contract, or official City notice of cancellation of the process, or a determination by the Council not to award a contract, provided the determination is final in accordance with Sections 605 and 609 of the Charter and Council does not direct the re-initiation of the competitive procurement at the time it determines not to make an award.

(k) "Proposer" shall mean a person, other than a City division or department, who puts forward, presents, or sponsors an expression of interest, statement of qualification, request, proposal, bid, or quote for consideration of a contract, including a bidder. For purposes of this article, a Proposer is also any agent or representative, or officer of a

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Proposer, and any person holding an ownership, beneficial, equitable or security interest in a Proposer. However, a commercial lending institution is not a Proposer if it merely holds a security interest as a result of a loan or loans which are made in the lender's regular course of business on terms available to members of the public without regard to official status.

(l) "Record" shall mean the oral and written information conveyed to the Mayor and Council through writings and statements made available to the public in connection with a competitive procurement, and upon which the Council could rely in considering whether to award a contract. "Record" shall include oral communication during a regular or special meeting of the Council.

(m) "Regulated communication" shall mean any communication prohibited under Section 3-605 of this article.

(n) "Request for Expression of Interest" (RFEI) means a solicitation to prospective proposers on a procurement opportunity. An RFEI may be issued in advance of an RFP to assist in the development of a more definitive set of terms and conditions, scope of work or service and the selection of qualified proposers. An RFEI does not contain all of the information a prospective proposer needs to provide a full bid or proposal response, and should not be construed as an RFP or notice inviting bids. The RFEI enables potential proposers to determine whether they have a serious interest in preparing a proposal or bid in response.

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The RFEI may be used simultaneously with a RFQ when the proposed procurement is well defined and the City has clear expectations for the procurement.

(o) "Request for proposal" (RFP) shall mean an invitation for providers of services or work to solicit the right to supply services or work to the City, when any award is to be made to a Proposer providing the best value in meeting the interest of the City and the objectives of the project, based on criteria, such as benefit to the City, qualifications, experience, and demonstrated ability, subject to the City's right to reject any and all proposals.

(p) "Request for qualification" (RFQ) shall mean a City request for the submission of a statement of qualifications from interested potential Proposers as a pre-requisite to a bid or proposal for the right to supply materials, supplies, equipment, services or work.

(q) "Subject Proposer," as used in Section 3-608 of this article, shall mean the Proposer who is the subject of a disclosure and consideration of potential sanctions.

(r) "Writing" shall mean a writing as defined in California Evidence Code Section 250.

SECTION 3-604. APPLICABILITY. This article applies to competitive procurement which may result in the award of a contract by the Council, including competitive bidding, request for proposals, request for expression of

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interest, and request for qualifications. It applies whether the procurement process is classified as legislative or otherwise. The requirements of this article apply upon the initiation of competitive procurement until the procurement process is completed, whether or not a contract is awarded. Any communication (even if unintended or inadvertent) covered by this article must be disclosed, as provided by this article or any other applicable local, state, or federal law or regulation.

### SECTION 3-605. REGULATION OF COMMUNICATIONS DURING COMPETITIVE PROCUREMENT; NOTICE OF REGULATED COMMUNICATION RULE.

(a) No Proposer shall initiate, engage in, or continue any communication to or with any elected official, and no elected official shall initiate, engage in, or continue any communication to or with any Proposer, concerning or touching upon any matter which is the subject of a competitive procurement within the scope of this article except as permitted in this Section 3-605.

(b) Only communications meeting the following requirements are allowed under this ordinance: a communication that is

(1) Made on the record in a regular or special meeting of the Council; or

(2) Between or among elected officials outside of a regular or special Council meeting, provided that none of the communicants is an agent or representative of a Proposer, or



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acting in concert with or at the behest of a Proposer, and provided further the communication is not prohibited under the Ralph M. Brown Act (California Government Code §§ 54950, *et seq.*); or

(3) Part of the record presented to the Council as a result of being communicated to City staff involved in, and in the ordinary course of, the competitive procurement; or

(4) An identical writing that is delivered simultaneously and by identical means to all elected officials, the City's Purchasing Agent, and the City Manager, at their respective official City offices. Except to the City's Purchasing Agent, hand deliveries must be made by someone other than a Proposer.

(c) The regulated communication rule established by this section and a reference to this article shall be set forth in each Bid Invitation, RFEI, RFP and RFQ, or in the respective specifications or other documents referred to therein.

SECTION 3-606. DISCLOSURE OF REGULATED COMMUNICATIONS.

(a) Any elected official and any Proposer who has initiated, engaged in, continued in, or received any regulated communication shall disclose that regulated communication, as provided in this section.

(b) A regulated communication should be disclosed at the earliest feasible time, but in any event, it shall be disclosed no later than 24 hours or the next business day following such communication, whichever is earlier.

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(c) Disclosures shall be in writing unless the regulated communication occurs on the date the Council is to consider award of the contract, in which case it may be orally disclosed on the record during the Council proceedings concerning the subject procurement. Written disclosures shall be directed to the City's Purchasing Agent, and a copy filed with the City Clerk.

(d) The disclosure shall contain all the information necessary to fully and fairly convey the substance of the communication. At minimum, disclosures shall include the following information:

- (1) Person making the disclosure.
- (2) Date, time and place of the regulated communication.
- (3) Identity of each person who initiated, engaged in, continued or received the regulated communication.
- (4) Copies of all written regulated communications.
- (5) Summary of all oral regulated communications.
- (6) Identity of all persons present during the regulated communication.
- (7) Identification of subject competitive procurement and subject Proposer.

(e) The City Clerk shall promptly distribute to all Councilmembers and the Mayor every disclosure filed pursuant to this section 3-606.

SECTION 3-607. SANCTIONS.

(a) In accordance with the applicable procedures for the respective competitive procurement as referenced or set forth in the specifications of the respective Bid Invitation, RFEI, RFP or RFQ, a Proposer violating this article may be sanctioned as follows:

- (1) Disqualification from the competitive procurement;  
and/or
- (2) A finding of non-responsibility under the procurement;  
and/or
- (3) Setting aside by Council of any award of contract prior to its execution by both parties.

(b) These sanctions may be imposed in addition to any remedies provided by any other law or regulation.

SECTION 3-608. EVALUATION OF DISCLOSED COMMUNICATIONS;  
CRITERIA FOR IMPOSITION OF SANCTIONS; APPEALS.

(a) The City's Purchasing Agent shall ensure that the information which is the subject of a disclosure is reviewed, evaluated, and processed in accordance with applicable laws and regulations, this article, and the specifications, criteria and requirements of the applicable competitive procurement.

(b) The City's Purchasing Agent shall report the disclosure in the record of the competitive procurement, summarize the results of the evaluation of the disclosure, and make a recommendation on whether or not to impose sanctions concerning the regulated communication.

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(c) Before sanctions may be imposed, it shall first be established that the subject Proposer did initiate, engage in or continue a regulated communication, and, if so, whether any of the following extenuating circumstances exist:

(1) The regulated communication was inadvertent and did not affect the integrity or outcome of the procurement process.

(2) The regulated communication was initiated by the Mayor or a Councilmember, the subject Proposer advised the Mayor or Councilmember of the regulated communication rule, and the subject Proposer did not continue or engage in the regulated communication.

(3) The regulated communication was made under bona fide mistake of fact or law, other than a mistake or ignorance of the provisions of this article, and the regulated communication was not material to the procurement. A regulated communication may be deemed material if it relates to any provision of a Bid Invitation, RFEI, RFP, RFQ, or specifications or other documents referenced therein, including documents responsive to a Bid Invitation, RFEI, RFP or RFQ, unless the regulated communication is so obviously insignificant and unimportant that it could be objectively found that no reasonable person would have been influenced by it, or attached any importance to it.

(d) In the absence of extenuating circumstances, the subject Proposer may be sanctioned under this article if doing so is deemed

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consistent with the objectives of this article and in the best interest of the City.

(e) The subject Proposer may appeal the determination of the City's Purchasing Agent that forms the basis of his or her recommendation for imposition of a sanction in accordance with the appeal procedures specifically applicable to the subject Bid Invitation, RFEI, RFP, or RFQ. In the absence of such a specifically applicable appeal procedure, the subject Proposer may take an appeal in accordance with Chapter 1, Article 5 of this Code.

(f) If a disclosure is made subsequent to the posting of the Council agenda which includes notice of the consideration of the subject contract, the Council shall refer the matter back to the Purchasing Agent for his or her evaluation, and report and recommendations, in accordance with this section.

**SECTION 2. SEVERABILITY.** The Council declares that the provisions of this ordinance are severable. If, for any reason, any sentence, paragraph, or section of this ordinance is determined by a court of competent jurisdiction to be invalid, such determination will not affect the validity of the remaining provisions of this ordinance.

**SECTION 3.** This ordinance shall become effective on the thirty-first day after its final passage.

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STATE OF CALIFORNIA       )  
COUNTY OF FRESNO       ) ss.  
CITY OF FRESNO           )

I, REBECCA E. KLISCH, City Clerk of the City of Fresno, certify that the foregoing ordinance was adopted by the Council of the City of Fresno, at a regular meeting held on the 30th day of March, 2004.

AYES       : Boyajian, Calhoun, Dages, Duncan, Perea, Sterling, Castillo  
NOES       : None  
ABSENT     : None  
ABSTAIN    : None

Mayor Approval: April 6, 2004  
Mayor Approval/No Return: N/A, 2004  
Mayor Veto: N/A, 2004  
Council Override Vote: N/A, 2004

REBECCA E. KLISCH  
City Clerk

BY: *Rebecca Klisch*  
~~Deputy~~

APPROVED AS TO FORM:  
CITY ATTORNEY'S OFFICE

BY: *[Signature]*  
Assistant

JJA:nd [29004nd/ord] //NAA JJA HCM (rev 3 25 04)

April 2, 2004

Council Adoption: 3/30/04

Mayor Approval:

Mayor Veto:

Override Request:

TO: MAYOR ALAN AUTRY

FROM: REBECCA E. KLISCH, CMC  
City Clerk

*RECEIVED*

2004 APR -7 PM 1:48

SUBJECT: TRANSMITTAL OF COUNCIL ACTION FOR APPROVAL OR VETO

At the Council meeting of 3/30/04, Council adopted the attached Resolution No. **2004-41**, entitled **Amend FMC re: regulating communications during competitive contracting process**, Item No. 2A, by the following vote:

Ayes	:	Boyajian, Calhoun, Dages, Duncan, Perea, Sterling, Castillo
Noes	:	None
Absent	:	None
Abstain	:	None

Please indicate either your formal approval or veto by completing the following sections and executing and dating your action. Please file the completed memo with the Clerk's office on or before April 11, 2004. Failure to file this memo with the Clerk's office within the required time limit shall constitute approval of the ordinance, resolution or action, and it shall take effect without the Mayor's signed approval.

Thank you.

\*\*\*\*\*  
**APPROVED:** *X*

**VETOED** for the following reasons: (Written objections are required by Charter; attach additional sheets if necessary.)

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*Alan Autry*  
\_\_\_\_\_  
Alan Autry, Mayor

Date: 4.6.04

**COUNCIL OVERRIDE ACTION:**

Date: \_\_\_\_\_

Ayes	:
Noes	:
Absent	:
Abstain	: